LEE HUN KEE & ORS. v. YEOH SENG HUAT

[O.C.J. (Hepworth J.) June 18, 1965]

[Penang — Civil Suit No. 267 of 1963]

Gift — Imperfect gift — Allegation of fraud — Gift perfected by donee being appointed one of the administrators of the estate — Rule in Strong v. Bird — Application of.

One YSK died in 1945 and letters of administration to his estate were granted to the first plaintiff (widow) and the defendant a brother of the deceased in 1948. The plaintiffs, the widow and children of the deceased, now claimed a declaration that the vulcanizing and tyre retreading business carried on by the deceased as sole proprietor before his death belonged to the estate of the deceased. The plaintiffs alleged that sometime in 1954 the defendant fraudulently induced the 1st plaintiff to execute business names forms for the registration and licensing of the business in the name of the defendant and 1st plaintiff as managing partner and sleeping partner respectively. In his defence the defendant pleaded that before his death the deceased had orally expressed the intention of making a gift of the business to the defendant and the first plaintiff equally and that in consequence of this he took over the management and control of the business.

Held: (1) neither the registration of the firm as a partnership in 1948 nor its registration in 1954 was procured by fraud;

(2) taking into consideration the surrounding circumstances and on a balance of probabilities, the deceased intended to make a gift out-and-out of the business to the first plaintiff and the defendant and such gift was of the business and the premises in which it was carried on. Such gift was perfected by the appointment of the defendant as one of the administrators of the estate of the deceased.

Cases referred to:—

(1) *Strong* v. *Bird* (1874), L.R. 18 Eq. 315.

(2) *Re Freeland, Jackson* v. *Rodgers* [1952] 1 Ch. 110.

(3) *In re Innes* [1910] 1 Ch. 188.

(4) *In re James* [1935] 1 Ch. 449.

CIVIL SUIT.

A. Jayadeva for the plaintiffs.

S. Thillaimuthu for the defendant.

Cur. Adv. Vult.

Hepworth J.: The plaintiffs are the widow and the children of Yeoh Seng Kai (hereinafter referred to as the deceased) who died intestate at No. 178, Prangin Road, Penang, on the 6th April, 1945. The defendant is the younger brother of the deceased.

Letters of administration to the estate of the deceased were granted to the 1st plaintiff, the widow of the deceased, and the defendant on the 3rd May, 1948.

The defendant is sued as one of the administrators of the estate of the deceased and also in his personal capacity.

Prior to his death the deceased was the tenant of premises No. 178, Prangin Road, Penang, wherein he carried on, as the sole proprietor, the business of vulcanizing and retreading motor tyres under the name and style of Kooi & Co. He had commenced this business on the 18th February, 1941, and it was duly registered under the Business Names Ordinance, 1940, on the 22nd February, 1941.

At the time of the deceased's death on the 6th April, 1945, the 2nd, 3rd, 4th and 5th plaintiffs were infants, the eldest, the 2nd plaintiff, being then 10 years of age.

The plaintiffs allege that the 1st plaintiff on the death of her husband, being illiterate, allowed the defendant who was then an employee of the deceased to manage the business on her behalf. They allege that out of the income of the business the defendant paid the rents for the premises and paid to the 1st plaintiff a sum of $150 per month as the net profits.

The plaintiffs allege that on or about the 12th May, 1954, the defendant fraudulently induced the 1st plaintiff to execute business names forms for the registration and licensing of the business in compliance with the Registration and Licensing of Businesses Ordinance, 1953, which resulted in the registration of the business as a partnership firm with the defendant as the managing partner and the 1st plaintiff as the sleeping partner.

The plaintiffs further allege that some time in the year 1962 the defendant dispossessed the plaintiffs of the business of Kooi & Co. and the premises at No. 178, Prangin Road, Penang, after the 1st plaintiff had refused to sign her consent to the transfer of the tenancy of the said premises by the landlord from the name of the deceased to that of the defendant.

Therefore the plaintiffs claim:—

(a) A declaration that the business of Kooi & Co. carried on at No. 178, Prangin Road, Penang, belongs to the estate of the deceased.

(b) That the defendant as one of the administrators and trustees of the estate of the deceased do render accounts of the business of Kooi & Co. from the 6th April, 1945.

(c) That upon the taking of such accounts such sums as are found due and payable be paid to the plaintiffs as beneficiaries of the estate of the deceased by the defendant.

(d) That the defendant do deliver up possession of the business of Kooi & Co. and the premises No. 178, Prangin Road, Penang.

In his defence the defendant pleads that some little time before the death of the deceased the deceased's health had been deteriorating and in consequence the deceased had orally expressed the intention of making a gift of the said business to the defendant and the 1st plaintiff equally and that such intention had continued unchanged until the deceased's death.

The defendant states that in consequence of this gift he took over the management and control of the business and carried on the business without objection from anyone until 1962. He alleges that in February of that year the 2nd plaintiff, who at that time was aged 27 and who had been employed in the business since the age of 14, had a quarrel with the defendant and left the business and as a result this action has been brought.

The defendant denies that at any time there has been any fraud on his part and he alleges that throughout the business has been run by him as a partnership business and the 1st plaintiff's share of the profits has been paid to her from time to time. It is contended on behalf of the defendant that the business including the tenancy of 178, Prangin Road never became a part of the estate of the deceased because the whole business was given to the 1st plaintiff and the defendant by the deceased prior to his death and although this did not have the effect of a legal transfer the fact of the subsequent appointment of the 1st plaintiff and the defendant as the administrators of the deceased's estate perfected their title to the business.

It is quite clear from the evidence that the deceased was a sickly man who had been ill for some little time prior to the date of his death. He had been seriously ill for approximately one month before he died. I think it very likely that, being aware of his ill health and realising that his wife was illiterate and knew nothing about the business, and having a number of young children, he would take steps to safeguard her interest in the business in the event of his death and that this could best be achieved by giving the business to the 1st plaintiff and the defendant, the defendant being conversant with the business and in a position to run it for the benefit of the deceased's family and himself.

When application was made for letters of administration by the 1st plaintiff and the defendant in 1948 the only asset disclosed in the estate duty affidavit was a sum of $937.59 cash in the deceased's account at the Bank of China. No reference was made to the business or the premises.

On the grant of letters of administration to the 1st plaintiff and the defendant in 1948 the defendant registered the 1st plaintiff and himself as the partners in Kooi & Co. under the Registration of Businesses Ordinance, 1947. The 1st plaintiff put her thumb-print on the necessary forms in the presence of a solicitor who certified that she understood the purport of such declaration. On the coming into force of the Registration and Licensing of Businesses Ordinance, 1953, on the 19th February, 1953, the defendant re-registered the business of Kooi & Co. as a partnership in the names of the 1st plaintiff and himself and it is this registration which the plaintiffs allege was obtained by the defendant by fraud. It is difficult to see how the obtaining of this registration could have been fraudulent if the registration of the business as a partnership had already taken place in 1948 and such registration was not fraudulent. The plaintiffs make no complaint about the 1948 registration. I am quite satisfied that neither the registration of Kooi & Co. as a partnership in 1948 nor its registration in 1954 was procured by fraud. The evidence of the defendant was corroborated by the evidence of D.W.2 and D.W.3 and everything points to the 1st plaintiff having full knowledge of what the position was right from the start.

There is no evidence that the defendant dispossessed the plaintiffs of the business and the premises in 1962. All he endeavoured to do was to have the tenancy taken out of the deceased's name and put in the same of the partnership.

I find as a fact that what the deceased intended to do was to protect his family by making the 1st plaintiff and the defendant partners in the business and that what has to be decided in this case is not what he purported to do but whether he in fact achieved his purpose.

The principle laid down in *Strong* v. *Bird* [1] is that an imperfect gift might be perfected by the subsequent appointment of the donee to be the donor's executor if the donor had an immediate intention to make an out-and-out gift and that intention survived until the donor's death. The principle has no application to the case where the donor had a mere intention to make a gift in the future. As stated by Lord Evershed, M.R. in *Re Freeland, Jackson* v. *Rodgers* [2] the principle of *Strong* v. *Bird* is directed to perfecting gifts complete in all respects except as regards the legal formalities necessary for the proper transfer of title to the particular property in question. It is confined to gifts where nothing remains to be done but the mere formality of transfer in order to perfect what was intended to be an immediate gift *inter vivos*. There is no room for the application of the principle where there was an intention to give which was not completed because the intending donor desired first to apply the subject matter of the gift to some other purpose. There must for the application of this doctrine be an intention of giving as distinct from an intention to give. (*Per* Parker J. in the case of *In re Innes* [3]).

In *In re James* [4] it was decided that the legal estate acquired by an administrator is no less effectual than that of an executor appointed by will to perfect an imperfect gift made by the deceased owner of the estate to the administrator.

The question that has to be decided therefore in this case is, did the deceased intend to do that which at the time of doing it was meant to be a gift out-and-out of the business to the 1st plaintiff and the defendant or did he intend to make a gift in the future which is in effect a promise to make a gift thereafter? Taking into consideration all the surrounding circumstances of this case in addition to the words which were used, in my opinion on the balance of probabilities the deceased intended to make a gift out-and-out of the business to the 1st plaintiff and the defendant prior to his death, and such gift was of the business and the premises in which it was carried on.

The plaintiffs' claim is dismissed with costs.

Claim dismissed.

Solicitors: *Jayadeva, Zahir & Ismi; S. Thillaimuthu.*

RE YAP HONG KHAI, DECEASED; *Ex Parte* WILLIAM JACKS & CO. (MALAYA) LTD.

[O.Bk.J. (MacIntyre J.) June 19, 1965]

[Ipoh — In Bankruptcy No. 108 of 1964]

Bankruptcy — Petition for administration of estate in — Letters of administration not extracted — Service of petition on persons to whom letters of administration not granted — Whether service good — Bankruptcy Ordinance, 1959, s. 122(4) — Bankruptcy Rules, 1921, r. 233(1).

An order was made under section 122(4) of the Bankruptcy Ordinance for the administration in bankruptcy of an estate on the petition of a creditor of the estate and the prescribed notice was ordered to be served on the administratrices of the estate. Before the order was extracted it was discovered that the administratrices had not extracted the grant of letters of administration. The question was whether the service of the petition on the administratrices was good or not.

Held: rule 233(1) of the Bankruptcy Rules requires the petition to be served on the person who has taken out letters of administration and therefore the service of the petition in this case was bad and the order made must be recalled.

Cases referred to:—

(1) *In re a Debtor* [1939] 1 Ch. 594.

(2) *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.* [1961] M.L.J. 89.

BANKRUPTCY.

W. S. W. Davidson for the applicant.

Assistant Official Assignee in person.

MacIntyre J.: At the hearing of this petition on 26th April 1965, I made an order under section 122(4) of the Bankruptcy Ordinance for the administration in bankruptcy of the estate of Yeap Hong Khai, deceased, upon proof of the petitioner's debt and upon proof of service of the prescribed notice upon Lim Ewe Kum (f) and Yap Mah Ni alias Yap Siew Hua (f), the administratrices of the estate of the said deceased.

Before the order was extracted, it was discovered that the administratrices had not extracted the grant of letters of administration whereupon I called upon Mr. Davidson who represented the petitioner at the hearing and the assistant official assignee to address the court on the question of the validity of the service of the notice upon the said administratrices.

The matter came up for hearing on the 3rd June 1965 and the argument resolved itself into a question of the proper interpretation of section 122(4) of the Bankruptcy Ordinance.

Section 122(4) reads as follows:

"Upon the prescribed notice being given to the legal representatives, if any, of the deceased debtor the court may, in the prescribed manner, upon proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss the petition with or without costs."

Mr. Davidson for the petitioner submitted that the occurrence of the words, "if any," after the words, "upon the prescribed notice being given to the legal representatives," indicated that a petition for the administration of a deceased's estate in bankruptcy could be made even if a legal representative had not been appointed. In this respect, he pointed out that the corresponding section in the English Bankruptcy Act of 1914, namely, section 130(2) differed from ours in that the words, "if any," are absent. He therefore contended that the decision in the case of *In re A Debtor* (1) in which it was held that on a true construction of section 130 the court had no power to make an order until the legal personal representative had been constituted did not apply under our law.

The second point he argued was that even if on a true construction of section 122(4) of the Bankruptcy Ordinance no order can be made until the legal personal representative had been served, the service of the notice in the present case was good and sufficient. He contended that for the purpose of service of the notice it was immaterial whether the administratrices had extracted the grant of letters of administration or not. He further contended that the judgment of Ismail Khan J., in *P. Govindasamy Pillay & Sons Ltd.* v. *Lok Seng Chai & Ors.*(2) only decided that a legal representative cannot sue or be sued until he had extracted his grant of letters of administration, and did not touch upon the question of the validity of the service of a notice upon an administrator who had not extracted the grant.

In this case I do not think that I have to consider the question whether the service of the